

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KENNETH F. WAS,

Plaintiff-Appellant,

v

CAROLYN PLANTE and OLHSA GUARDIAN  
SERVICES,

Defendants-Appellees.

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UNPUBLISHED

June 22, 2006

No. 265270

Livingston Probate Court

LC No. 04-007287-CZ

KENNETH F. WAS,

Plaintiff-Appellee,

v

CAROLYN PLANTE and OLHSA GUARDIAN  
SERVICES,

Defendants-Appellants,

and

ROSE HILL CENTER, INC.,

Defendant.

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No. 266224

Livingston Circuit Court

LC No. 03-019711-CZ

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In Docket No. 265270, plaintiff appeals as of right the probate court order granting summary disposition pursuant to MCR 2.116(C)(8) and (10) in favor of defendants Carolyn Plante and OLHSA (Oakland Livingston Human Services Agency) Guardian Services. In Docket No. 266224, defendants Plante and OLHSA appeal by leave granted the circuit court order granting plaintiff's motion for relief from judgment, which set aside the circuit court's order granting summary disposition under MCR 2.116(C)(4) and asserted jurisdiction over plaintiff's tort claims, but which affirmed the grant of summary disposition under MCR

2.116(C)(7) on the basis of res judicata for the claims related to the sale of land. We affirm in Docket No. 265270, and reverse in Docket No. 266224.

On May 31, 2000, Livingston County Community Mental Health filed petitions to have a guardian appointed for plaintiff and a conservator appointed for his assets, due to plaintiff's mental illness. On June 29, 2000, the probate court appointed OLHSA conservator of all assets of plaintiff's estate and as limited guardian over plaintiff's legal, medical, psychiatric, and placement affairs. Plante was an OLHSA employee involved in the handling of plaintiff's affairs until OLHSA was discharged on November 21, 2001, following a final accounting.

During the pendency of the guardianship and conservatorship, plaintiff was hospitalized for psychiatric care from January 8, 2001, until October 19, 2001, at Rose Hill Center, Inc. During this period, plaintiff's home was sold pursuant to a petition and subsequent order of the probate court approving the sale. Additionally, Plante consented to a suspension of plaintiff's physician assistant license for a minimum period of six months and one day "for the purpose of resolving the matter<sup>1</sup> without filing an Administrative Complaint against" plaintiff (emphasis in original).

On January 24, 2003, plaintiff filed a civil action in circuit court against OLHSA, Plante, and Rose Hill arising from the sale of plaintiff's home and personal effects, from the placement of plaintiff at Rose Hill, and from the consent to suspension of plaintiff's physician assistant license. The complaint involves claims for breach of fiduciary duty, tortious interference with a contractual or advantageous business relationship or expectancy, intentional infliction of emotional distress, respondeat superior, and negligence. Defendants moved for partial summary disposition with respect to all claims arising from the sale of plaintiff's home and personal property pursuant to MCR 2.116(7), asserting that the probate court orders approving the sale of the home and the order allowing accounts barred plaintiff's claims regarding the sale of the home and the disposition of various assets under the doctrine of res judicata. Defendants also moved for summary disposition of the entire complaint pursuant to MCR 2.116(C)(4) for lack of subject matter jurisdiction "because the probate court has exclusive jurisdiction over proceedings concerning a guardianship or conservatorship."

The circuit court granted summary disposition pursuant to MCR 2.116(C)(4) and (7) for OLHSA and Plante on April 30, 2004. The circuit court determined that res judicata barred the claims arising out of the sale of the home and personal effects because the probate specifically approved the sales. The circuit court granted summary disposition of the remaining claims for lack of jurisdiction on the ground that the probate court, under MCL 700.1302, has exclusive legal and equitable jurisdiction over a "proceeding that concerns a guardianship, conservatorship, or protective proceeding."

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<sup>1</sup> "This matter" refers to a violation of section 16221(b)(iv) of the public health code, MCL 333.16221(b)(iv), which provides a personal disqualification from the practice of a health profession by a licensee who is declared mentally incompetent by a court of competent jurisdiction.

On June 3, 2004, plaintiff filed a virtually identical complaint in Livingston Probate Court, omitting only the claim against Rose Hill. On November 2, 2004, the probate court granted defendants' motion for partial summary disposition pursuant to MCR 2.116(C)(7), finding that res judicata precluded the claims involving the sale of plaintiff's home and personal effects.

At a pretrial hearing on February 15, 2005, the probate court sua sponte addressed the issue of probate court jurisdiction over the tort claims. The court appeared equivocal on the issue of probate court jurisdiction over those claims, but ultimately concluded that:

this is just a pretrial hearing here today where we usually do a scheduling order. . . . What we usually do is figure the trial date and work back as far as a discovery cutoff and a motion date . . . So my position at this point is that if Mr. Prine wishes to go forward with his case here that it'll be a nonjury bench trial.

On April 29, 2005, plaintiff filed in circuit court a motion for relief from the April 4, 2004, order of dismissal. Plaintiff argued that he was entitled to relief pursuant to MCR 2.612(C) because the circuit court's ruling that it lacked jurisdiction was a mistake as demonstrated by the fact that the probate court found that it lacked jurisdiction over the claims. Plaintiff also argued that the jurisdictional analysis had been altered by a change in the law – that being the enactment of the estates and protected individuals code (EPIC), MCL 700.1101 *et seq.* In response, defendant argued that plaintiff's motion for relief from judgment was really an untimely motion for reconsideration or an untimely appeal. Further, according to defendants, there had been no "mistake" within the meaning of the court rule because the circuit court correctly applied the law. Defendants also argued that EPIC conferred jurisdiction on the probate court, not the circuit court.

A hearing was held in circuit court on plaintiff's motion for relief from judgment on June 28, 2005. Before taking the motion under advisement, the circuit court stated:

. . . the problem is that the matter comes from Judge Reck not in the form of an appeal. This matter is brought as a relief from a judgment that I made and we have this procedural quagmire that you seem to be caught in. I granted summary disposition, sent it to Judge Reck saying that she had the jurisdiction, Judge Reck said no, Judge Latrielle has the jurisdiction, and then we have a motion for relief from judgment.

On July 29, 2005, defendants moved in probate court for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff filed a response to the motion for summary disposition on August 16, 2005, asserting, in part, that defendants' motion for summary disposition was brought on the claims pursuant to MCR 2.116(C)(8) and (10), "despite the Court's prior ruling on March [sic, February] 15, 2005 that this Honorable Court lacks jurisdiction and that summary disposition was the appropriate resource, if not in fact already granted on those grounds, sua sponte, on February 15, 2005." Plaintiff requested a declaratory ruling regarding jurisdiction before a ruling on defendants' motion for summary disposition. Defendants argued in response that plaintiff did not appeal the circuit's order dismissing the complaint on jurisdictional grounds, that plaintiff filed the complaint in probate court, and that the probate court had jurisdiction over the matters pleaded in the complaint.

At the hearing on defendants' motion for summary disposition on August 23, 2005, the probate court made a declaratory ruling that the probate court had jurisdiction over the claims. The probate court thereafter granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(8) and (10) in an order dated August 30, 2005. Plaintiff filed an appeal as of right from the probate court order on September 20, 2005.

On October 19, 2005, the circuit court entered an opinion and order granting plaintiff's motion for relief from judgment. The circuit court found that there had been no change in the law since its prior decision, but that a "mistake" within the meaning of MCR 2.612(C)(1)(a) occurred when the court erroneously concluded that EPIC conferred jurisdiction on the probate court over torts arising from the duties of guardians and conservators. The circuit court concluded that the circuit court has jurisdiction over such tort claims under MCL 600.1021(2). This Court granted defendants' application for leave to appeal the circuit court order granting relief from judgment.

Docket No. 265270

Plaintiff challenges the probate court's assumption of jurisdiction over his tort claims, contending that he filed his claims in probate court only because the circuit court dismissed the claims in circuit court on the ground that the circuit court did not have jurisdiction over the claims. Plaintiff never filed an appeal from the circuit court's dismissal under MCR 2.116(C)(4) and simply refiled the same claims in probate court.

Circuit courts in Michigan "have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given ... by statute to some other court." MCL 600.605. Under EPIC, the probate court has exclusive subject matter jurisdiction as provided in MCL 700.1302(c):

Except as otherwise provided in section 1021 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1021, a proceeding that concerns a guardianship, conservatorship, or protective proceeding.

The probate court has exclusive jurisdiction over a proceeding<sup>2</sup> that concerns a guardianship, conservatorship, or protective proceeding. A review of plaintiff's complaint reveals that plaintiff's claims clearly arise out of the allegedly inappropriate conduct of the fiduciaries relative to their court-appointed duties as guardian and conservator. But for the probate court appointment of OLHSA as guardian and conservator for plaintiff and his assets there would be no relationship between plaintiff and defendants. In *Manning v Amerman*, 229 Mich App 608; 582 NW2d 539 (1998), the plaintiffs, the beneficiaries of a trust, filed an action in circuit court against the trustee of the trust. The factual allegations forming the basis of the plaintiffs' second amended complaint were that the trustee breached his fiduciary duty as trustee, used the trust assets for his own purposes, and eviscerated the trust of its value, all of which

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<sup>2</sup> A "proceeding" is defined in EPIC as including "an application and a petition, and may be an action at law or a suit in equity." MCL 700.1106(p).

caused plaintiffs to suffer financial and emotional damages. Specifically, the plaintiffs' complaint alleged tortious interference with a trust/contractual relationship, intentional infliction of emotional distress, negligent infliction of emotional distress, legal malpractice, breach of contract, and unjust enrichment. *Id.* at 610. The circuit court found that the plaintiffs' claims were within the exclusive jurisdiction of the probate court and dismissed the complaint pursuant to MCR 2.116(C)(4). On appeal, the plaintiffs argued that the circuit court erred in determining that the probate court had exclusive jurisdiction over plaintiffs' emotional distress and malpractice claims simply because the cause of arose out of the administration of a trust. *Id.* This Court disagreed, noting that under § 21 of the Revised Probate Code (RPC),<sup>3</sup> MCL 700.1 *et seq.*, the probate court had exclusive jurisdiction over proceedings concerning the administration of and other matters pertaining to the trusts under MCL 700.21(b) [now MCL 700.1302(b)]. *Id.* at 611-612. Although the present case involves a guardianship and conservatorship under MCL 700.1302(c) [former MCL 700.21(c)], rather than a trust under MCL 700.1302(b), the statute provides exclusive jurisdiction, both legal and equitable, to the probate court in matters concerning trusts, as well as matters concerning guardianship, conservatorship, or protective proceedings. This Court determined in *Manning* that the allegations against the defendant were inextricably intertwined with the trust and the relationship of the defendants to the trust. The allegations in the present case are similarly inextricably intertwined with the guardianship and conservatorship and the relationship of defendants to the guardianship and conservatorship.

Given the breadth of the *Manning* holding, the probate court properly concluded that it had subject matter jurisdiction over plaintiff's claims. Tort claims against a guardian or conservator fall within the exclusive jurisdiction of the probate court because such claims concern the guardianship or conservatorship, and the exception to this exclusive jurisdiction does not apply in this case.

Plaintiff also argues that the probate court's statements at the February 15, 2005, pretrial hearing caused plaintiff to assume that the probate court would not accept jurisdiction over the tort claims. He argues that he did not find out which issues were being litigated until *after* the trial court ruled on the issue. He claims that he was deprived of notice and opportunity to be heard because he did not adequately address the tort claims in his response to defendants' motion for summary disposition because he did not believe that the probate court would be ruling on the tort claims. Plaintiff did not assert a due process claim below and, therefore, this issue is unpreserved. An unpreserved constitutional error is forfeited unless there is a showing of plain error that affected substantial rights. *In re Osborne*, 237 Mich App 597, 606; 603 NW2d 824 (1999).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *In re Brock*, 442 Mich 101, 110-111; 499 NW2d 752 (1993), quoting *Mathews v Eldridge*, 424 US 319, 332, 334; 96 S Ct 893; 47 L Ed 2d 18 (1976) (internal

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<sup>3</sup> The Revised Probate Code was repealed by 1998 PA 386, effective April 1, 2000. MCL 700.21 is now found at MCL 700.1302 in EPIC.

quotations omitted). "Procedure in a particular case is constitutionally sufficient when there is notice of the nature of the proceedings and a meaningful opportunity to be heard by an impartial decision maker." *Reed, supra* at 159. Due process is a flexible concept, the essence of which is to ensure fundamental fairness. *Id.*

Although the probate court initially made verbal comments indicating that it was equivocal on the issue of jurisdiction, it never issued an order dismissing the tort claims for lack of jurisdiction. Indeed, by the conclusion of the February 15 hearing, the court stated:

And again this is just a pretrial hearing here today where we usually do a scheduling order. . . . What we usually do is figure the trial date and work back as far as a discovery cutoff and a motion date . . . So my position at this point is that if Mr. Prine wishes to go forward with his case here that it'll be a nonjury bench trial.

Defendants' March 15, 2005, civil pretrial statement recites the procedural history of the circuit court action and the probate court action up until that date and provides defenses to all five counts in plaintiff's complaint. The statement also indicates that "Motion for partial summary disposition has previously been granted by the Court and an Order entered on December 14, 2005. The Defendants anticipate additional Motions for Summary Disposition." Thus, plaintiff was put on notice that defendants were continuing to defend the tort claims and that a motion for summary disposition on those claims should be anticipated, yet plaintiff brought no motions before the trial court with regard to jurisdiction.

Additionally, when defendants filed a motion to compel independent medical examination, plaintiff contended in his reply that "plaintiff's mental status was not at issue as a result of the February 15, 2005, pre-trial ruling." But, despite plaintiff's assertion, the probate court granted the motion. Once again, plaintiff was on notice that the tort claims remained before the probate court.

Further, the language in defendants' July 29, 2005, motion for summary disposition makes it abundantly clear that defendants were moving for summary disposition of all of the claims in plaintiff's complaint, including the tort claims. Rather than defend the motion in his August 16, 2005, response to the motion for summary disposition, plaintiff simply chose to again rely on his interpretation of the probate court's statements at the February 15, 2005, hearing. He briefly addressed defendants' motion and requested that the probate court issue a declaratory ruling regarding jurisdiction before ruling on defendants' motion for summary disposition. At no time did plaintiff assert before the trial court that he lacked notice and an opportunity to be heard, or the ability to present a full defense, with regard to defendants' motion for summary disposition. Plaintiff has demonstrated no plain error.

Lastly, plaintiff argues that the probate court erred by granting summary disposition pursuant to MCR 2.116(C)(10) of all of the tort claims. A trial court's decision on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561, 664 NW2d 151 (2003).

Plaintiff presents cursory arguments with regard to why summary disposition of each count was improper. With regard to Count I – Breach of Fiduciary Duty – plaintiff argues that

“For a claim of breach of fiduciary duty to be viable, all that is required is the failure of a fiduciary to act for the benefit of her principal.” He contends that Plante’s purported reasons for consenting to the suspension of his physician’s assistant are suspect and are subject to a credibility determination that precludes summary disposition. With regard to Count II – tortious interference – plaintiff argues that Plante “contacted plaintiff’s employer with the express desire to, and effect of, seeing him terminated from his employment” and that Plante’s actions in regard to plaintiff’s license “also played a role in her efforts to render Plaintiff unemployed and unemployable.” With regard to Count III – intentional infliction of emotional distress – plaintiff contends that Plante “rather outrageously, saw to it that Plaintiff became unemployed, lost his professional license and embarked on an ongoing many year odyssey in an effort to recapture the license and career she causally threw away while claiming to act on his behalf.” With regard to Count IV- respondeat superior – plaintiff argues that summary disposition is “inappropriate if any of Plaintiff’s other claims are viable.” With regard to Count V – negligence – plaintiff argues that “if a fact question exists on Counts I, II, or III,” a “tangential question also exists on Count V.”

Plaintiff has completely failed to adequately present the facts and argue the merits of any of the arguments presented with regard to this issue, and has failed to offer sufficient documentary evidence in support of his position. A party who fails to adequately brief an argument abandons the argument on appeal. *Yee v Shiawassee County Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Thus, we decline to address the issue. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).<sup>4</sup>

Docket No. 266224

Defendants argue that the circuit court erred by granting plaintiff’s motion for relief from judgment. This Court reviews a trial court’s ruling on a motion for relief from judgment for an abuse of discretion. *Yee, supra*.

In his motion for relief from judgment, plaintiff asserted in part:

3. That on April 30, 2004, an Order for Dismissal as to Defendants Carolyn Plante and OLHSA only was entered with regard to the determination of the Court that it lacked subject matter jurisdiction for the reasons stated on the record on April 6, 2004.

4. That a result of the Court’s Ruling that Plaintiff’s claims against Defendants Carolyn Plante and OLHSA were in fact within the sole jurisdiction of the Probate court, . . . Plaintiff’s claims were refiled in the Probate Court, Family Division . . .

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<sup>4</sup> We note, however, that the lower court record reveals that plaintiff failed to present evidence to establish the existence of a genuine issue of material fact with respect to each of the claims contained in his complaint.

5. That on March 15, 2005, a Pre-Trial Conference was held before the Honorable Susan L. Reck in the successor file number 04-07287-CZ, at which the time the Honorable Judge Reck ruled, sua sponte, that only Plaintiff's Count I Breach of Fiduciary Duty – Carolyn Plante, was subject to Probate Court jurisdiction, and only to the extent allowed pursuant to the EPIC . . .and declining any jurisdiction whatsoever over the remaining tort claims alleged by Plaintiff in his Complaint.

Pertinent to this appeal, plaintiff cited MCR 2.612(C) in support of his motion for relief from judgment. Specifically, plaintiff relied on MCR 2.612(C)(1)(a), arguing that “interpretation of authorities cited by Defendants’ counsel conferring subject matter jurisdiction of Plaintiff’s tort claims upon the Probate Court is a “mistake” as provided in said Court Rule.” Plaintiff also relied on MCR 2.612(C)(1)(f), arguing that the “subsequent refusal of the Livingston County Probate Court to exercise the jurisdiction over Plaintiff’s tort claims . . . constitute “any other reason justifying relief from the operation of the Judgment.”

The factual basis for plaintiff’s motion – that the probate court had declined jurisdiction – is erroneous. Contrary to plaintiff’s assertion, no orders had been entered in the probate court on jurisdictional issues. The probate court never declined jurisdiction and, in fact, litigated the claims. Summary disposition is the procedural equivalent of a trial on the merits that bars relitigation on principles of res judicata. See, e.g., *ABB Paint Finishing, Inc v Nat’l Union Fire Ins Co of Pittsburgh, PA*, 223 Mich App 559, 563-565; 567 NW2d 456 (1997). The circuit court erred by reasserting jurisdiction over the very same claims that were litigated in probate court and that proceeded to judgment.<sup>5</sup>

We affirm in Docket No. 265270 and reverse in Docket No. 266224.

/s/ Helene N. White  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Talbot

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<sup>5</sup> Additionally, for the reasons stated above in Docket No. 265270, the circuit court also erred in its determination that the circuit court has jurisdiction over the claims.